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NOTES.

CONSTITUTIONALITY OF WEBB-KENYON ACT.—The failure of the Commerce Clause to intimate whether or not the power of Congress over interstate commerce is exclusive has led the courts to evolve the doctrine that as to matters lending themselves to local control[1] or as to certain subjects of police regulation,[2] the States may legislate, in the absence of federal action, although interstate commerce is indirectly affected; but as to subjects national in character, admitting of and requiring uniformity of regulation, the jurisdiction of Congress is exclusive.[3] The right of a State to regulate the traffic in intoxicat-

[1]Cooley *v.* Port Wardens (1851) 12 How. 299, 319.

[2]Hennington *v.* Georgia (1896) 163 U. S. 299; Gladsden *v.* Minnesota (1897) 166 U. S. 427; Smith *v.* Alabama (1888) 124 U. S. 465.

[3]See Gibbons *v.* Ogden (1824) 9 Wheat. 1; Robbins *v.* Shelby Taxing District (1887) 120 U. S. 489; Bowman *v.* Chicago, etc., Ry. (1888) 125 U. S. 465; Covington, etc. Bridge Co. *v.* Kentucky (1894) 154 U. S. 204.

ing liquor within its borders was early sustained,[4] and in the *License Cases*[5] considerable power on the part of the States, in the absence of congressional action, was recognized. But in *Bowman* v. *Chicago, etc. Ry.*[6] the *License Cases* were overruled, in so far as they permitted the States to regulate interstate commerce; and in *Leisy* v. *Hardin*[7] it was decided that so long as the shipment remained in the original package the state law could not attach. It was suggested in the last two cases that by express congressional permission the States might be admitted into the field which had up to that time been held subject to the jurisdiction of Congress alone.[8] Shortly thereafter, Congress, apparently acting upon these *dicta,* passed the Wilson Act.[9]

The constitutionality of the act was attacked on the ground that it was a concession to the States of power exclusively vested in Congress. This was denied by the Supreme Court in *In re Rahrer,*[10] where the act was upheld as the enunciation of a uniform rule that intoxicating liquor shall be divested of its interstate commerce character at an earlier period than would otherwise be the case.[11] It was held that the point at which the divesting would occur was the arrival of the goods in the consignee's hands,[12] and that its sale thereafter could be regulated by the States. The attempt might have been made to support this act under the federal power to exclude obnoxious articles from interstate commerce; but this would have involved an adoption as the test for exclusion of the state law to cover the portion of the interstate journey after the liquor's arrival.[13] It would seem that Congress has no power to declare that during one portion of its interstate journey a shipment is not in interstate commerce, for this amounts to construing the Constitution. In either view, it is inconsistent to insist that the power of Congress over interstate commerce in subjects of national scope is exclusive in that no State can be admitted into the field, and then to sanction the adoption by Congress of a rule which in operation would not be uniform. The only explanation of the Wilson Act is that Congress permitted the State to regulate a portion of the liquor's interstate journey.

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[4]Mugler *v.* Kansas (1887) 123 U. S. 623.

[5](1847) 5 How. 504.

[6]*Supra.*

[7](1890) 135 U. S. 100, 119.

[8]Bowman *v.* Chicago, etc. Ry., *supra,* pp. 485, 493; Leisy *v.* Hardin, *supra,* pp. 109, 119, 124, 125; see also Lyng *v.* Michigan (1890) 135 U. S. 161.

[9]26 U. S. Stat. at L. 313. The act provided that "all intoxicating liquors * * * transported into a State * * * or remaining therein for use, consumption, sale or storage shall, upon arrival in such State * * * be subject to the operation and effect of the laws of such State enacted in the exercise of the police power * * * as if produced therein".

[10](1891) 140 U. S. 545.

[11]The act had been upheld squarely on the *dicta* above referred to. *In re* Van Vliet (C. C. 1890) 43 Fed. 761.

[12]Rhodes *v.* Iowa (1898) 170 U. S. 412.

[13]The Lacey Act, 31 U. S. Stat. at L. 187, excluding from interstate commerce game killed in violation of the laws of the State, has been referred to as an analogous adoption of state law. But the validity of this act is based upon the peculiar nature of the State's ownership of animals *ferae naturae.* See Rupert *v.* United States (C. C. A. 1910) 181 Fed. 87.

The Webb-Kenyon Act of 1913[14] prohibits the shipment into a State of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold or used in violation of any law of such State. This law, also, is sought to be harmonized with the theory of absolute exclusiveness by contending that the test for the prohibition of an interstate shipment of liquor which Congress has thereby created is a uniform one,[15] that is, a rule of intent.[16] But, in effect, Congress is not prescribing a uniform rule of intent but is leaving it to the various States to determine whether or not liquor intended to be "received, possessed, sold, or used" shall be admitted within their borders.[17] And the court in *Grier* v. *State* (Del. 1913) 88 Atl. 579, in sustaining the Webb-Kenyon Act, seems in error, in reasoning that it can be sustained consistently with the doctrine of absolute exclusiveness over national subjects in that it provides a uniform rule of prohibition. It would seem preferable to hold squarely that Congress may decide, in its discretion, that uniformity as to a certain subject of interstate commerce of national scope is unnecessary and thereby admit the States into the field; and that its discretion, if reasonably exercised, will be upheld.[18]

MARSHALING OF SECURITIES.—In adjudicating the claims of two creditors to a *res* in which one has a claim to the whole while the other's interest is only in a part, it is established in equity that the prior claimant, having recourse to two funds, must first satisfy his demand out of that property of the debtor which the other cannot reach.[1] The rule can never be invoked to prejudice the prior creditor,[2] but if he should resort to the doubly charged fund when he can amply satisfy himself out of that which is singly liable, the subsequent demandant will be subrogated *pro tanto* to the other's rights in the singly charged fund.[3] It follows from this doctrine that one who purchases a part of the premises from the mortgagor without actual notice of the encumbrance, and neither assumes nor takes subject to

[14]37 U. S. Stat. at L. 699.

[15]The argument is similar to that used to justify the adoption by Congress in the Bankruptcy Act of 1898 of the state laws as to exemptions. See Hanover Bank *v.* Moyses (1902) 186 U. S. 181. But it was unnecessary to strain the meaning of uniformity, since it had been repeatedly held that the power of the States over bankruptcy was concurrent. Sturges *v.* Crowninshield (1819) 4 Wheat. 122; Ogden *v.* Saunders (1827) 12 Wheat. 213.

[16]Intent as a test for exclusion has been sustained as to the transportation of women for immoral purposes. Hoke *v.* United States (1913) 227 U. S. 308.

[17]This is emphasized by the fact that the act prescribes no penalty and no means for its enforcement.

[18]See Thayer, Cases on Constitutional Law, 2190, note.

[1]4 Pomeroy, Eq. Juris. (3rd ed.) § 1414. It has been said that if the "single" creditor is himself bound to the "double" creditor and the primary liability is personal, the former cannot have the assets marshaled as against the latter. See Dolphin *v.* Alyward (1870) L. R. 4 Eng. & Ir. App. Cas. 486, 505.

[2]1 Story, Eq. Juris. (13th ed.) § 633.

[3]Slade *v.* Van Vechten (N. Y. 1844) 11 Paige 21.